

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

LLOYD AND ESTHER CATON,

Appellants,

v.

State of Washington DEPARTMENT
OF ECOLOGY,

Respondent.

PCHB No. 90-42

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

On March 6, 1990 Lloyd and Esther Caton filed an appeal contesting the Department of Ecology's ("DOE") denial of an application for a change and addition of withdrawal points for Ground Water Permit No. G4-24454P. ("Application for Change") A hearing on the merits was held on August 9 and 22, 1990 in Cle Elum, Washington. Chair Judith A. Bendor was present for the Pollution Control Hearings Board. Board Member Harold S. Zimmerman has reviewed the record. Appellants Caton were represented by Attorney Roger Castelda of Tonasket. Respondent DOE was represented by Assistant Attorney General Kerry O'Hara. Court Reporters Cathy S. Shoemaker of Steichen & Hewitt (Wenatchee) and Linda S. Stevens of Jackie Adkins & Assoc. (Yakima) took the proceedings.

At the hearing John and Adeline Oakes were represented by an attorney and moved to intervene. The motion was opposed by appellant, asserting surprise and prejudice. The motion was denied. The Oakes and their attorney remained during the first day and were allowed to

1 confer with the Department during the proceedings. The Oakes returned
2 on August 22, 1990 without their attorney.

3 At the hearing witnesses were sworn and gave testimony. Exhibits
4 were admitted and were examined. Argument was made and filed. From
5 the foregoing, the Board makes these:

6 FINDINGS OF FACT

7 I

8 The Catons have lived on their property in the Aeneas Creek Basin
9 since 1963. Esther Caton's grandfather purchased 160 acres in 1903.
10 In 1978 Esther and Lloyd Caton purchased the property from Esther
11 Caton's mother. In 1983 the Catons purchased additional property
12 adjacent to the south from the Hathaways.

13 II

14 On October 2, 1985 Lloyd and Esther Caton filed an application to
15 change a portion of the place of use, and to change and to add a point
16 of withdrawal for Ground Water Permit No. G4-24454P. The proposed
17 points of withdrawal are about 2,000 feet from Aeneas Creek. In 1990
18 the Department of Ecology granted the place of use change, but
19 otherwise denied the application. The Catons filed an appeal with the
20 Pollution Control Hearings Board, which became PCHB No. 90-42, the
21 subject of this proceeding.

22 III

23 Aeneas Creek flows generally southeasterly. It originates in the
24
25
26

1 Aeneas Mountains at the 4,000 foot elevation and flows for 8 miles to
2 its confluence with the Okanogan River at elevation 900 feet. The
3 confluence is 3 miles south of the town of Tonasket.

4 The Aeneas Creek Basin is a single aquifer, a relatively small
5 system. Precipitation in the Basin ranges from 15 to 19 inches per
6 year. The precipitation equals 7,000 acre-feet per year. About 700
7 acre-feet of it enters and recharges the groundwater.

8 The Creek's drainage consists of a series of benches with steep
9 sections in between. The bedrock was scoured by glaciers, leaving
10 depressions filled with glacial outwash of sand, gravel, clay and
11 silt. The soils provide limited groundwater storage in this area.
12 The groundwater is only recharged by local precipitation.

13 There is a glacial moraine which somewhat impedes groundwater
14 flows from the upper to lower portions of the Basin. This causes
15 groundwater levels in the upper portion to be closer to the surface.

16 The flows in Aeneas Creek fluctuate seasonally, from a spring
17 high of 10 cubic feet per second ("cfs") due to freshets, to a late
18 summer low of 1 to 2 cfs. After the spring freshets, during
19 irrigation season, most of the water is underground and there is
20 little flow in Aeneas Creek.

21 IV

22 The Creek has been the subject of water rights litigation since
23 the early 1900s. In 1909 Okanogan County Superior Court allocated the
24

1 entire flow of the Creek's upper reaches in East v. Hubert, Cause No.
2 1259. Water Rights Claims No. 162051 and 162052, as amended by
3 Certificate of Change Recorded in Vol. 1-4 Page 211, were filed to
4 document the rights allocated in that decree to Zachery T. East.
5 The property is now owned by Trout Farms Orchards, Inc, John Oakes
6 owner. Water Rights Claim No. 128303 was filed by Knorr and Jaeger to
7 document their right. (The Bermans had a right mentioned in the
8 decree, but no claim has been found in DOE files.)

9 Okanogan Superior Court allocated the remaining waters in Aeneas
10 Creek's lower reaches to Tonasket-Okanogan Orchards, in Cause No.
11 6220, dated 1925. Walter Jones now owns that property.

12 Since 1986 both Trout Farms and Mr. Jones have contacted the
13 Department contending that insufficient water is available in the
14 Creek to satisfy their water rights. Precipitation in Central
15 Washington from 1985 to 1990 was below normal.

16 V

17 Ground Water Permit No. G4-24454P was originally issued to Glen
18 and Sharon Hathaway (priority date February 7, 1977). The permit
19 authorized the withdrawal of 460 gallons per minute ("gpm"), 175.7
20 acre-feet per year, for domestic supply and the irrigation of 43 acres
21 from May 1 to October 1. The well was to be located on a terrace 80
22 vertical feet above Aeneas Creek (1600 feet south and 2,000 feet east
23 of the center of Section 21, within SE1/4 SE1/4 of Section 21, T.
24 37N., R 26 E.W.M.).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

VI

In 1978 the Catons filed Ground Water Application No. G4-25997C for a well ("original well"), to be located 700 feet north and 500 feet east of the center of Section 21, within SW1/4NE1/4 of Section 21. They requested authorization for domestic supply and irrigation. The Department granted a certificate for domestic use only: 10 gpm and 0.5 acre feet per year. The Department concluded that the well was in hydraulic continuity with Aeneas Creek, and that pumping from that location for consumptive use would be detrimental to downstream water rights holders.

VII

In 1983 the Catons purchased the adjacent Hathaway property in an effort to obtain water for irrigation. Prior to the purchase they conferred with DOE staff to determine the likelihood of being able to change the Hathways' point of withdrawal and were told that it was 99% likely that they would get a change. The Department also informed them by letter prior to purchase about the procedures for obtaining an assignment of rights and a change of point of withdrawal, including the requirement for publication and public comment. The letter stated that after the comment period, "a field examination will need to be made in order for us to make our permitting decision." Exh. A-2.

VIII

In 1984 the Catons applied for a change of use and points of

1 withdrawal for G4-24454P. The Department informed them that the
2 application could not be processed until the Hathaways assigned the
3 water rights permit. On May 8, 1985 the Hathaways formally assigned
4 the water right to the Catons, reserving 2 acre-feet for their own use.

5 In September 1985 the Catons re-applied to DOE for these
6 changes. The proposed well locations were: the "original well" which
7 was supplying the Catons' home under permit G4-25997C, and a well to be
8 located 900 feet north and 80 feet east of the center of Section 21,
9 also within SW1/4NE1/4 of Section 21. This second well is known as
10 "Well No. 2". These wells' locations are the subject of this appeal.

11 IX

12 After the Hathaways had been granted water rights permit No.
13 G4-24454P, they endeavored to dig a producing well, but did not find
14 sufficient water. DOE granted extensions of time to construct the
15 water irrigation system. The Hathaways did not perfect this water
16 right permit and a water rights certificate was not issued to them.

17 After G4-24454P was assigned to the Catons, in 1987 they dug two
18 wells ("Well No. 1", 400 feet south and 500 feet east of the west
19 quarter corner of Section 22, and "Well No. 2").

20 X

21 The Catons applied to DOE and received several one-year
22 extensions, including the last one to October 1989. The Catons'
23 extension request in 1986 stated that it was needed:

24 to see if a change in point of diversion is granted before
25 investing funds. Exh. R-10.

1 In several extension requests, the Catons provided DOE with a
2 description of their construction. In September 1987 they informed
3 the Department that Well No. 2 was 28 feet, delivered 200 gpm and
4 construction remained, including connecting Well No. 2 to the well in
5 operation and then to Well No. 1 and installing pumps. Exh. R-10.
6 They informed DOE they didn't want to install pumps and lines at this
7 time of year due to the weather, but intended to use this system by
8 May 1, 1988. They were granted an extension to October 1988. In the
9 fall of 1988 the Catons informed the Department about further
10 construction and requested another extension, which was granted.

11 The Catons were caught in a dilemma. On the one hand they were
12 being told to complete construction on permit G4-24454P or it would
13 be cancelled, and on the other hand DOE had not yet acted on their
14 outstanding Application for Change. Usually it takes two or three
15 years to process such applications. In this instance it took longer
16 due to legislatively-mandated priority given to drought relief work.

17 DOE conceded during the hearing that their extension letters
18 were confusing, and that staff did not compare the locations recited
19 in the Catons extension letters with the Application for Change
20 proposed locations. The Department has since revised its
21 procedures. Clearly it was inadvisable to state that the Application
22 for Change was 99% likely to be granted.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

XI

On September 28, 1989, after DOE inspected the Catons' wells in response to complaints, a stop-work order was issued regarding irrigation. The Catons had apparently been irrigating at least 13 acres for ten years, knowing they did not have permission. They stopped irrigating after receiving the notice. The Department may have previously been aware of the irrigation, but had not taken formal enforcement action.

XII

By letter (December 1989) the Department stated to the Catons that water right permit G4-24454P would be cancelled unless the Catons could show cause otherwise. The Department concedes this letter should not have been sent. The Department has not cancelled this permit.

XIII

On January 31, 1990 the Department issued an order denying the Application for Change, which was appealed.

The property now contains a few cherry trees and a few animals are pastured there. There are no irrigated crops. Two homes are on-site, including the Catons' and their daughter's double-wide mobile home.

XIV

At this hearing, the Department's own expert witness (Jackson)

1 testified that granting the Application for Change would impair
2 recharge to the lower basin by 33 acre feet per year, impairing
3 downstream water rights holders to that extent. We find that
4 granting this Application would have that result.

5 XV

6 Any Conclusion of Law deemed to be a Finding of Fact is hereby
7 adopted as such.

8 From these Findings of Fact, the Board makes these:

9 CONCLUSIONS OF LAW

10 I

11 The Department denied this Application for Change based on the
12 impact to existing senior water rights holders. RCW 90.44.100
13 requires that other existing rights not be impaired.

14 We have found, based on the Department's witness, that granting
15 the Application would detrimentally impact existing senior water
16 rights only to the extent of 33 acre feet per year. Finding of Fact
17 XIV, above. Therefore, 142.7 acre feet per year (175.7 acre-feet
18 minus 33 acre feet), is predicted to not cause impairment.

19 II

20 Appellants contend the Department is estopped from denying the
21 application because of the Department's: 1. assertion prior to the
22 Catons' purchase of the Hathaway property that it was 99% likely that
23 the application would be granted; and/or 2. granting of extensions.
24
25
26

1 Equitable estoppel against the State acting in its governmental
2 capacity is not favored. Pioneer National Title Insurance Company v.
3 State of Washington, 39 Wn. App. 758, 760-761, 695 P.2d 996 (1985).
4 Even if all the required elements were met, see Board of Regents of
5 the University of Washington, et al. v. City of Seattle, 108 Wn.2d
6 545, 551, 741 P.2d 11 (1987), it is still not to be applied where it
7 would interfere with the State's exercise of its governmental
8 function. Shafer v. State of Washington, 83 Wn.2d 618, 622, 521 P.2d
9 736 (1974). Here granting the Application for 175.7 acre feet would
10 harm senior water rights holders. Therefore applying estoppel and
11 granting this application for that amount would impermissibly
12 interfere with the State's duties to protect the public and regulate
13 the public waters of the state under Chaps. 90.03 and 90.54 RCW.

14 Because we conclude that granting estoppel violates the State's
15 duty, we do not and need not address whether the estoppel elements
16 outlined in Board of Regents, supra, have been met.

17 III

18 Appellants contend their entire application be granted because
19 DOE can later-on regulate their withdrawals should impairment
20 result. Appellants' suggested approach is in direct conflict with
21 the basic statutory framework which is designed to prevent harm. We
22 decline to take that road, which is not "well" traveled.

23 IV

24 Any Findings of Fact deemed to be a Conclusion of Law is hereby
25 adopted as such. From these Conclusion of Law, the Board enters this:

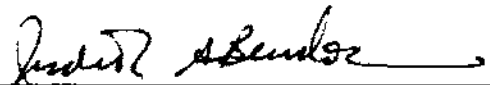
26
27 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
PCHB No. 90-42

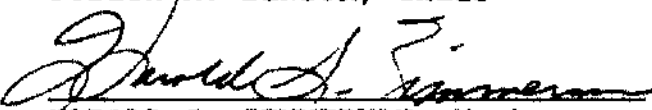
ORDER

The Department of Ecology's Order Denying Change and Addition of Points of Withdrawal for Groundwater Permit G4-24457P is REVERSED IN PART. The matter is REMANDED to the Department for action consistent with this decision (Finding of Fact XIV and Conclusion of Law I).

DONE this 3rd day of Janaury 1991.

POLLUTION CONTROL HEARINGS BOARD


JUDITH A. BENDOR, Chair


HAROLD S. ZIMMERMAN, Member